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SUPREME COURT, U. S.

No. 73-1573

**In the
Supreme Court of the United States**

OCTOBER TERM, 1973

HAROLD WITHROW, D.O.; THOMAS HENNEY, M.D.; A. J. SANFELIPPO, M.D.; JOHN M. IRVIN, M.D.; J. W. RUPEL, M.D.; A. L. FREEDMAN, M.D.; MARK T. O'MEARA, M.D.; THOMAS W. TORMEY, JR., M.D.; individually and as members of the Medical Examining Board of the State of Wisconsin,

Appellants,

vs.

DUANE LARKIN, M.D.,

Appellee.

On Appeal from the United States District Court for the
Eastern District of Wisconsin.

**MOTION FOR LEAVE TO FILE
SUPPLEMENTAL BRIEF
and
SUPPLEMENTAL BRIEF OF APPELLEE**

ROBERT H. FRIEBERT
Attorney for Appellee

Of Counsel:
SAMSON, FRIEBERT, FINERTY & BURNS
710 North Plankinton Avenue
Milwaukee, Wisconsin 53203
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The appellee by his attorney Robert H. Friebert hereby moves the Court to allow him to file a supplemental brief to discuss a recent decision of the Wisconsin Supreme Court which decision discusses many issues which are pertinent to the above captioned case. Copies of this new opinion have been previously filed with the Clerk of Court.

Dated February 11, 1975.

P.O. ADDRESS:
710 North Plankinton Avenue
Milwaukee, Wisconsin 53203
(414) 271-0130

Respectfully submitted,
ROBERT H. FRIEBERT,
Attorney for Appellee

SUPPLEMENTAL BRIEF OF APPELLEE

On February 5, 1975, the Wisconsin Supreme Court in *Hortonville Education Association v. Hortonville Joint School District*, Wis. 2d, N.W. 2d, Case No. 635, August Term, 1974 (1975), made several rulings which are significant to this appeal.

The Wisconsin Supreme Court held that school teachers are entitled to due process of law before they can be discharged for engaging in a strike which violates Wisconsin law. Slip opinion, pp. 14-17. Aside from the obvious property right involved, the Wisconsin Supreme Court held that teachers charged with breach of contract and engaging in an illegal strike were threatened with a deprivation of liberty which could affect the teachers' reputation and employment opportunities. Slip opinion, pp. 16-17.

The Wisconsin Supreme Court went on to hold that a school board "was not an impartial decisionmaker in a constitutional sense" when it was involved "in the events which precipitated decisions they were required to make." Slip opinion, p. 19. Thus, the board violated the due process rights of teachers when it imposed disciplinary action for striking.

The Wisconsin Supreme Court also noted that the procedures which are available for subsequent judicial review of administrative decisions could not cure the due process violation because the scope of such review is too limited. Slip opinion, pp. 20-21. "[I]t is difficult to see how either review by common-law certiorari or by the WERC can replace an impartial decisionmaker in the first instance." Slip opinion, p. 21.

Finally, the Wisconsin Supreme Court observed that:

"[D]ue process is not limited to the factual determination as to whether an individual did or did not engage in the particular conduct. It extends as well to the action taken by the state once that conduct is established. * * *

"Therefore, it would seem essential, even in cases of undisputed or stipulated facts, that an impartial decisionmaker be charged with the responsibility of determining what action shall be taken on the basis of those facts." Slip opinion, p. 18.

Since the Wisconsin Supreme Court appears to have resolved the issues in this case, the appellee respectfully requests the Court to consider this recent development in Wisconsin law.

ROBERT H. FRIEBERT
Attorney for Appellee

Of Counsel:

SAMSON, FRIEBERT, FINERTY & BURNS
710 North Plankinton Avenue
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